Filed 4/4/16 In re K.S. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re K.S., a Person Coming Under the Juvenile Court Law.	H041562 (Santa Clara County Super. Ct. No. JV40070A)
THE PEOPLE, Plaintiff and Respondent, v. K.S., Defendant and Appellant.	

K.S., a minor, appeals from an order of wardship (Welf. & Inst. Code, § 602, subd. (a)) entered after the juvenile court found that he committed two counts of a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a) – counts 1 & 2) and oral copulation by force or duress on a child under the age of 14 (Pen. Code, § 288a, subd. (c)(2)(B) – count 3). The juvenile court declared appellant a ward of the court, returned him to the custody of his father, and placed him on probation. Appellant raises contentions relating to the corpus delicti rule and the sufficiency of the evidence. We conclude that there was insufficient evidence to support the oral copulation by force or duress finding. Accordingly, the order is modified to reduce count 3 to a lewd and

lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)). As modified, the order is affirmed.

I. Statement of Facts

In May 2013, appellant, who was 14 years old, lived with his father, his father's girlfriend, his grandmother, his uncle, his brothers, and his sisters, T.D. and V.D. T.D. was 10 years old and V.D. was seven years old.

One day, T.D. and appellant were watching a movie when appellant "squish[ed]" her buttocks over her pants. She was scared. After he removed his hand, she told him to stop. T.D. denied that she ever told a police officer that it hurt. While they were watching a movie on another occasion, he touched her buttocks and breasts over her clothing with both hands. T.D. told him "don't do that ever again."

Appellant told T.D. not to tell anyone about these incidents. T.D. never told anyone because she did not want him to get into trouble. She did not know if he was touching V.D.

When T.D. was interviewed by the police, she stated that appellant had kissed her on the lips and touched her vagina and buttocks. He also told her to get on top of him. According to T.D., he "made" her and said, "Just do it." She "had to fight him, but he pushed [her] on anyways." During the previous year, appellant touched her vagina with his hand under her underwear more than once.

V.D. was eight years old at the time of the contested hearing. She responded to most questions by stating "I don't know" or "I don't remember." The juvenile court ruled that V.D. was unavailable as a witness and excluded her prior statements to the police.

R.W., the father of appellant, T.D., and V.D., was living with his mother, his brother, and his children in May 2013. On May 13, 2013, he saw appellant, who was naked, on the bed with V.D. V.D. was lying on her stomach, her pants were pulled down,

and her buttocks were exposed. R.W. believed appellant was "trying to arouse her." Appellant stopped as soon as R.W. walked into the room. R.W. was very angry and confused, pulled appellant to the side, and asked him what he was about to do. Appellant initially said that he was looking for his underwear and did not do anything wrong. However, he eventually stated that he was "about to put his thing on his sister." Prior to this incident, neither of R.W.'s daughters had ever told him that appellant was touching her.

G.B., appellant's grandmother, took V.D. for a sexual assault examination at Valley Medical Center. At some point, appellant admitted to her that he had "touched" V.D. V.D. told G.B. that appellant touched her "on the private" more than one time.

Helen Lund, a social worker with the Department of Family and Children Services, investigated the incident that R.W. reported. Lund interviewed appellant, who told her that he had just gotten out of the shower and was naked. He felt kind of curious and "almost touched her." When he pulled down her underwear, she woke up. He did not pull her underwear all the way down and his father walked into the room. His father told him that it was not good and he should not do it again. Appellant also told Lund that he tried to touch T.D., but stopped himself.

Lund attempted to interview V.D., but V.D. ran out of the room. Lund later told V.D. that her sister "had something happen to her" and T.D. "said enough that made [V.D.] realize that something was going on with her as well." V.D. looked "shocked," stated that appellant touched her "in my private with his finger," and pointed "to the front and back." V.D. also stated that appellant used "his privates to rub onto her private." V.D. did not disclose any penetration.

Lund also took a statement from T.D. T.D. stated that there was a lot of fighting and yelling in the house and her brothers bossed her around. Both appellant and her other brother had put their hands between her legs, but she did not tell her father. Appellant also touched her "everywhere" and kissed her. T.D. asserted that she never took her

clothes off and told appellant to stop, but he did not. Appellant told her to lie on top of him and "squish[ed her] butt with his hands." Appellant had never taken her clothes off or put his fingers in her "private parts."

On May 20, 2013, Officer Robert Dillon interviewed appellant. Appellant stated, "I started . . . touching my sisters in the private spot . . . ." He began the inappropriate touching a month and a half before the interview. Appellant was watching V.D. while she was taking a shower to ensure that she did not get water on the floor or slip and hurt herself. Appellant became curious about "how the girl's body looked" and said to V.D., "Don't tell dad but just um, let me touch your private spot." V.D. allowed him to rub her vagina with his fingers. When V.D. wanted him to stop, he did so.

Appellant also told the officer that appellant and V.D. were watching television a couple of weeks later. V.D. was wearing a T-shirt with no underwear. Appellant was wearing boxers. Appellant said, "Let me touch your butt and feel it." After he told her to lie on the bed, he rubbed his non-erect penis on her buttocks. After about three minutes, he had an erection and he stopped touching V.D.

Appellant next stated that he went to V.D.'s room after he took a shower. This incident occurred about a week before the interview with Dillon. V.D. was half-awake. Appellant pulled down her pants and rubbed his erect penis on her body. He did not penetrate her or rub her vagina. Appellant's father entered the room, asked him what he was doing, and contacted Child Protective Services.

Appellant also described an incident that occurred about a month before the interview. He and V.D. were in his grandmother's room when appellant said, "Get on your knees and open your mouth." V.D. asked him why and he said, "You're going to suck my penis." V.D. was on her knees and opened her mouth. Appellant put his penis in her mouth for two seconds and pulled it out.

II. The Juvenile Court's Findings

The petition alleged that appellant committed two counts of lewd and lascivious acts on a child under the age of 14 by force, violence, duress, menace, or fear (Pen. Code, § 288, subd. (b)(1)). However, the juvenile court found that it was not convinced beyond a reasonable doubt that appellant committed these counts by force, violence, duress, menace, or fear. Thus, it sustained these counts as lewd and lascivious acts on a child under the age of 14 (Pen. Code, § 288, subd. (a)). Regarding the oral copulation by force or duress allegation (Pen. Code, § 288a, subd. (c)(2)(B)), the trial court stated: "I think the evidence is clearly beyond a reasonable doubt that there was force. I think that when a fourteen-year-old says to an eight-year-old in the context of what happened, get on your knees, open your mouth, you're going to suck my penis, it contains an implied threat that is clearly duress under the circumstances, and so I think that count three has been proven beyond a reasonable doubt."

III. Discussion

A. Procedural Issues

The Attorney General argues that the juvenile court lacked jurisdiction to dismiss appellant's probationary status while the present appeal was pending.

In October 2014, appellant filed his notice of appeal. Two months later, the juvenile court dismissed appellant's probation. No notice of appeal was filed from this order. A notice of appeal in a juvenile case must generally be filed "within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, former rule 8.406(a)(1).) "A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.'" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) Here, since there has been no appeal from the order dismissing appellant's probation, this court does not have jurisdiction to decide the issue raised by the Attorney General.

In response to a request by this court, the parties have submitted supplemental briefing as to whether the December order rendered the present appeal moot.

A party cannot maintain an action that involves only abstract or academic questions of law. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814.) When the reviewing court cannot provide any relief if it should decide in the appellant's favor, a case is moot. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.) Here, the parties agree that to the extent that the juvenile court found that appellant committed two counts of lewd and lascivious acts and oral copulation by force or duress, the appeal is not moot. A juvenile adjudication subjects appellant to collateral legal consequences. (See e.g., Welf. & Inst. Code, §§ 707, subd. (b), 781 [prohibition against the sealing of his juvenile records]; Pen. Code, § 29820, subds. (a)(1) & (2), (b) [prohibition against his possession of a firearm until the age of 30]; Veh. Code, § 13105 [considered a conviction for the purposes of driving privileges].) Accordingly, we conclude the appeal is not moot.

B. Corpus Delicti of Oral Copulation by Force or Duress

Appellant contends that there was insufficient evidence to establish the corpus delicti of oral copulation by force or duress.

We begin by setting forth the applicable law on the corpus delicti rule. "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*).) The purpose of the corpus delecti rule is "to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Id.* at p. 1169.)

"'"Wigmore explains [the rule] this way: every crime 'reveals three component parts, *first* the *occurrence* of the specific kind of injury or loss (as in homicide, a person deceased; in arson, a house burnt, in larceny, property missing); *secondly,* somebody's criminality (in contrast, e.g., to accident) as the source of the loss,—these two together involving the commission of a crime by *somebody;* and *thirdly,* the accused's *identity* as the doer of this crime.' By the great weight of authority, the first two without the third constitute the *corpus delicti.*" [Citation.]'" (*People v. Davis* (2008) 168 Cal.App.4th 617, 633.)

Evidence of the corpus delecti "may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible." (*Alvarez, supra,* 27 Cal.4th at p. 1171.) The prosecution is not required to introduce independent evidence "'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.]" (*Ibid*.) Once this evidence is present, "the defendant's extrajudicial statement may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Ibid*.)

Relying on *People v. Wright* (1990) 52 Cal.3d 367,[1] the Attorney General argues that since appellant did not raise the corpus delicti issue before the juvenile court, he has failed to preserve his claims for review. We disagree. In *Alvarez,* the California Supreme Court discussed the issue of forfeiture: "In *Wright, supra,* 52 Cal.3d 367, we held the defendant could not complain his extrajudicial statements were improperly *admitted* without independent proof of the corpus delicti, because he had not objected on that ground at the time the statements were proffered. [Citations.] We noted that the prosecution might have withheld available independent proof because no corpus delicti objection was raised, and that the defense's silence might signal a wish to forestall the

[1] *Wright, supra,* 52 Cal.3d 367, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.

presentation of such additional damaging evidence. [Citations.] No decision of this court, including *Wright*, has suggested that an evidentiary objection at trial is a prerequisite to raising *instructional* and *sufficiency* claims on appeal. However, post-*Wright* Court of Appeal decisions have split on whether, by virtue of *Wright's* reasoning, the defendant must either give the prosecution trial notice of his insistence on independent proof or forfeit the benefit of the independent-proof rule entirely." (*Alvarez, supra,* 27 Cal.4th at p. 1172, fn. 8.)

One of the post-*Wright* cases cited in *Alvarez* was *People v. Lara* (1994) 30 Cal.App.4th 658, 675 in which this court held that the failure to object on corpus delicti grounds to the admission of extrajudicial statements did not forfeit the issue that the corpus delicti instruction was improperly omitted. (*Alvarez*, *supra*, 27 Cal.4th at p. 1172, fn. 8.) We also note that *Alvarez* recognized that "appellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. (E.g., *Wright*, *supra*, 52 Cal.3d 367, 403-405; *People v. Morales* (1989) 48 Cal.3d 527, 552-553 . . . ; *People v. Alcala* (1984) 36 Cal.3d 604, 624-625 . . . ; *People v. Towler* (1982) 31 Cal.3d 105, 115. . . .)" (*Alvarez*, *supra*, 27 Cal.4th at p. 1170.) Accordingly, we conclude that appellant's claim as to the sufficiency of the evidence of the corpus delicti has not been waived.[2]

In considering the issue of whether there was sufficient evidence of the corpus delicti of oral copulation by force or duress, *People v. Jones* (1998) 17 Cal.4th 279 (*Jones*), *People v. Tompkins* (2010) 185 Cal.App.4th 1253 (*Tompkins*), and *People v. Robbins* (1988) 45 Cal.3d 867 (*Robbins*)[3] are instructive.

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[2] Since we conclude that appellant was not required to object to the admission of his extrajudicial statements in order to raise this issue on appeal, we need not consider his alternative argument that his counsel rendered ineffective assistance.

[3] *Robbins*, *supra*, 45 Cal.3d 867 was superseded by statute as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, footnote 13.

In *Jones*, the defendant was convicted of, among other things, murder, rape, and oral copulation. (*Jones*, *supra*, 17 Cal.4th at pp. 290-291.) *Jones* rejected the defendant's argument that the corpus delicti of oral copulation had not been established. (*Id.* at p. 302.) In *Jones*, the victim was not wearing underwear or shoes and semen was found in her vagina, external genitalia, and anus, thus indicating that multiple sexual acts had occurred. (*Ibid.*) There was also evidence that "the victim was forcibly abducted, beaten, shot in the head, and left by the side of the road for dead [which gave] rise to the inference that the sexual activity that occurred was against the victim's will." (*Ibid.*) *Jones* concluded that "[t]his circumstantial evidence of multiple forcible sexual acts sufficiently establishe[d] the requisite prima facie showing of both (i) an injury, loss or harm, and (ii) the involvement of a criminal agency." (*Ibid.*)

In *Tompkins*, the defendant was charged with, among other things, 11 counts of lewd and lascivious acts on a child under 14 over a year and a half period. (*Tompkins*, *supra*, 185 Cal.App.4th at pp. 1256-1257.) The defendant argued that he could not be convicted of six of these counts based solely on his extrajudicial statements. (*Id.* at p. 1259.) In *Tompkins*, the victim testified that the defendant molested her more than once but less than 50 times, she visited the defendant every other weekend during that period, and the defendant molested her on some of her visits. (*Id.* at p. 1260.) An investigator testified that the victim told him that the "defendant had touched her 'on many occasions,' and 'several incidents' had occurred near his computer." (*Ibid.*) *Tompkins* concluded that "separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts. [Citation.]" (*Ibid.*)

In *Robbins*, the defendant was convicted of murder and the jury found as a special circumstance that the murder was committed during a lewd and lascivious act on a minor. (*Robbins*, *supra*, 45 Cal.3d p. 871.) Due to the long delay before the discovery of the victim's body, "it was impossible to verify the sexual conduct by scientific evidence."

(*Id.* at p. 886.) *Robbins* held that there was sufficient evidence independent of the defendant's admissions to establish the special circumstance. (*Ibid.*) This evidence included: the defendant was seen riding in the area on the date of the victim's disappearance; no clothes were found at the crime scene; the defendant's experts diagnosed him with pedophilia; the defendant's admission of similar sexual conduct in another jurisdiction was confirmed by scientific evidence; and the physical evidence of the homicide matched other aspects of the defendant's statements. (*Ibid.*)

Here, it was alleged that appellant committed a violation of Penal Code section 288a, which provides in relevant part: "Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] . . . [¶] . . . Any person who commits an act of oral copulation upon a person who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years." (Pen. Code, § 288a, subds. (a) & (c)(2)(B).)

Appellant contends that the evidence was only sufficient to establish the corpus delicti of a lewd and lascivious act.

We disagree with this contention since independent evidence "'of every physical act constituting an element of an offense'" is not required by the corpus delicti rule. (*Alvarez*, *supra*, 27 Cal.4th at p. 1171.) Here, though appellant's statements established significant elements of the charged offense, there was adequate independent evidence showing harm to V.D. and criminality as the source of this harm. Appellant was found naked on a bed with V.D. V.D. was lying on her stomach and her pants were partially pulled down to reveal her buttocks. V.D. told her grandmother that appellant touched her "on the private" more than one time. V.D. told the social worker that appellant touched her "in my private with his finger," and pointed "to the front and back." V.D. also stated that appellant used "his privates to rub onto her private." Thus, there was evidence

independent of appellant's statements tending to show multiple unlawful sexual acts involving V.D. Moreover, there was sufficient independent evidence tending to show that appellant used force or duress in committing the oral copulation allegation. According to T.D., appellant "made" her get on top of him and when she fought him, "he pushed [her] on anyways." This evidence is analogous to that in *Robbins, supra,* 45 Cal.3d 867 in which evidence that the defendant committed a sodomy on another victim was part of the corpus delicti for the charged lewd and lascivious act on a minor special circumstance. (*Id.* at p. 886.) We recognize that the juvenile court in the present case found that force had not been established beyond a reasonable doubt as to counts 1 and 2, but proof of the corpus delicti "need not be beyond a reasonable doubt." (*Alvarez, supra,* 27 Cal.4th at p. 1171.) Since the prosecutor made a prima facie showing of harm to V.D. and the involvement of criminal agency, the corpus delicti of oral copulation by force or duress was established.

C. Sufficiency of the Evidence

Appellant next contends that there was insufficient evidence to support an order sustaining the finding of oral copulation by force or duress.

"'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.' [Citation.]" (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 994.) "'Under this standard, the critical inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.]'" (*Ibid.*)

Penal Code section 288a, subdivision (c)(2)(B) makes it a felony for any person to commit an act of oral copulation upon a child under the age of 14 years "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ."

Here, appellant told V.D. to get on her knees and open her mouth. When she asked why, he said, "You're going to suck my penis." Appellant put his penis in her mouth for two seconds. The trial court found that "when a fourteen-year old says to an eight-year old in the context of what happened, get on your knees, open your mouth. You're going to suck my penis, it contains an implied threat that is clearly duress under the circumstances, and so I think that count three has been proven beyond a reasonable doubt."[4]

In *People v. Espinoza* (2002) 95 Cal.App.4th 1287 *(Espinoza*), this court considered whether the defendant committed multiple lewd acts by duress. In that case, the victim, L., was the defendant's 12-year-old daughter and a student in special education classes. (*Id.* at p. 1292.) When the defendant molested her on five occasions, the victim was "'too scared to do anything . . . .'" (*Id.* at pp. 1292-1293.) After reporting the defendant's conduct to school personnel, the victim was "'very worried about her own safety in going home.'" (*Id.* at p. 1295.) *Espinoza* recognized that "'[d]uress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. . . . "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim" [are] relevant to the existence of duress.'

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[4] The juvenile court also found that "the evidence is clearly beyond a reasonable doubt that there was force," but did not identify the evidence supporting this finding. However, force is defined as "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*People v. Bolander* (1994) 23 Cal.App.4th 155, 158-159, disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12 (*Soto*).) Here, there is no evidence of force and the Attorney General does not contend otherwise.

[Citation.]" (*Id.* at p. 1320.) This court held that there was insufficient evidence of duress, stating: "The only way that we could say that defendant's lewd act on L. and attempt at intercourse with L. were accomplished by duress is if the mere fact that he was L.'s father and larger than her combined with her fear and limited intellectual level were sufficient to establish that the acts were accomplished by duress. What is missing here is the '"direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted."' [Citation.] Duress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat . . . .' [Citation.] No evidence was adduced that defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind." (*Id.* at p. 1321.)

Here, appellant was V.D.'s brother and seven years older than she was. He was also physically larger than V.D. and had committed multiple unlawful sexual offenses. However, as in *Espinoza*, there was no evidence that appellant explicitly or implicitly threatened V.D.

The Attorney General argues that *Espinoza* is distinguishable from the present case. She points out that the 12-year-old victim in *Espinoza* was older than V.D., who was seven years old when the offense occurred, and thus more susceptible to being coerced. V.D. may have been more susceptible to being coerced by a threat of force due to her age.[5] However, there was no evidence of a direct or implied threat, and thus any increased susceptibility to that nonexistent threat is irrelevant.

The Attorney General next notes that the victim in *Espinoza* had only recently moved in with her father while V.D. had a "longer standing relationship with appellant

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[5] Since the victim in *Espinoza* was in special education classes, it is not clear that she was less vulnerable than V.D. (*Espinoza*, *supra*, 95 Cal.App.4th at p. 1292.)

which bolstered his authority over her." First, there is nothing in the record to indicate how long appellant and V.D. lived together. Second, it is highly unlikely that V.D. viewed her 14-year-old brother as a greater authority figure than the victim in *Espinoza* viewed her father.

The Attorney General also argues that an implied threat was supported by a pattern of sexual abuse. This argument was specifically rejected in *Espinoza.* "While it was clear that L. was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Espinoza, supra,* 95 Cal.App.4th at p. 1321.)

Nor are we persuaded by the Attorney General's argument that there was evidence of duress when appellant told V.D. on a previous occasion not to tell their father about his touching her. In connection with the incident in which V.D. was in the shower, appellant said, "Don't tell dad but just um, let me touch your private spot." The juvenile court found that appellant's lewd acts were not committed by force or duress. Thus, this evidence does not support the Attorney General's position.

The Attorney General's reliance on *People v. Veale* (2008) 160 Cal.App.4th 40 (*Veale*) and *People v. Pitmon* (1985) 170 Cal.App.3d 38 (*Pitmon*)[6] is misplaced. In *Veale*, the defendant molested his seven-year-old daughter on several occasions. (*Veale*, at p. 43.) The victim did not tell her mother about the molestations, because she feared that "something might happen to her or mother if she told" and "defendant would hurt her if she told." (*Id.* at p. 44.) *Veale* held that there was sufficient evidence of duress and explained: "A reasonable inference could be made that defendant made an implied threat sufficient to support a finding of duress, based on evidence that [the child] feared

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[6] *Pitmon, supra,* 170 Cal.App.3d 38 was overruled on other grounds in *Soto, supra,* 51 Cal.4th at page 248, footnote 12.

defendant and was afraid that if she told anyone about the molestation, defendant would harm or kill [her], her mother or someone else. Additional factors supporting a finding of duress include [the child's] young age when she was molested; the disparity between [the child's] and defendant's age and size; and defendant's position of authority in the family." (*Id.* at p. 47.) In contrast to *Veale*, there was no evidence that V.D. was afraid of appellant. Thus, this court cannot infer that appellant made an implied threat.

Pitmon, *supra*, 170 Cal.App.3d 38 is also distinguishable from the present case. In *Pitmon*, the defendant was convicted of eight counts of committing lewd acts with a child under 14 years of age by means of force or duress. (*Id.* at pp. 43-44.) *Pitmon* held that there was sufficient evidence of force and duress in the commission of these counts. (*Id.* at pp. 48-51.) As to force, the reviewing court explained: "There can be little doubt that defendant's manipulation of Ronald's hand as a tool to rub his genitals was a use of physical force beyond that necessary to accomplish the lewd act. The facts show defendant had hold of Ronald's hand throughout this act. Further, the record reveals that in those instances in which Ronald orally copulated defendant, defendant slightly pushed Ronald's back during each performance of that act. Again this displayed a use of physical force that was not necessary for the commission of the lewd acts." (*Id.* at p. 48.) *Pitmon* then listed the factors it considered in determining whether there was substantial evidence of duress: the victim was eight years old; the disparity in physical size between the victim and an adult; and the defendant was a stranger to the victim. (*Id.* at p. 51.) *Pitmon* also focused on the defendant's use of force in committing the various acts as evidence of "an implied threat of force, violence, hardship or retribution which prompted Ronald against his will to participate in the sexual acts." (*Ibid.*) Unlike in *Pitmon*, here, there was insufficient evidence of force.

In sum, there was insufficient evidence of oral copulation by duress. However, when there is overwhelming evidence that a defendant is guilty of a lesser included

offense, the order may be reduced to the lesser offense. (*People v. Steger* (1976) 16 Cal.3d 539, 553.)

IV. Disposition

The order is modified to reduce count 3 to a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)). As modified, the order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.